

# Mass Litigation Panel

The Chairman of the Mass Litigation Panel is Judge Alan D. Moats of the Nineteenth Judicial Circuit (Barbour and Taylor Counties). Members of the panel are Judge Thomas C. Evans, III, of the Fifth Judicial Circuit (Jackson and Mason Counties); Judge Jay M. Hoke of the Twenty-Fifth Judicial Circuit (Boone and Lincoln Counties); Judge John A. Hutchison of the Tenth Judicial Circuit (Raleigh County); Judge James P. Mazzone of the First Judicial Circuit (Brooke, Hancock, and Ohio Counties); Judge Booker T. Stephens of the Eighth Judicial Circuit (McDowell County); and Judge Derek C. Swope of the Ninth Judicial Circuit (Mercer County).

The following is a list of mass litigation referred to the panel, the county in which the litigation is pending, and the judge or judges assigned to the litigation.

## **Asbestos Personal Injury Litigation-Kanawha County**

Ronald E. Wilson, Presiding Judge<sup>1</sup>  
Mark A. Karl, Assisting Judge  
James P. Mazzone, Assisting Judge

## **FELA Asbestos Litigation-Kanawha County**

Arthur M. Recht, Presiding Judge<sup>2</sup>  
Jay M. Hoke, Assisting Judge

## **Digitex® Litigation-Kanawha County**

Alan D. Moats, Lead Presiding Judge  
Booker T. Stephens, Presiding Judge  
Derek C. Swope, Presiding Judge

## **Float-Sink Litigation-Raleigh County**

John A. Hutchison, Lead Presiding Judge  
Thomas C. Evans, III, Presiding Judge  
Alan D. Moats, Presiding Judge  
Jay M. Hoke, Lead Resolution Judge  
James P. Mazzone, Resolution Judge  
Booker T. Stephens, Resolution Judge

## **Flood Litigation-Raleigh County**

John A. Hutchison, Lead Presiding Judge  
Jay M. Hoke, Presiding Judge  
Derek C. Swope, Presiding Judge  
Booker T. Stephens, Lead Resolution Judge  
James P. Mazzone, Resolution Judge  
Alan D. Moats, Resolution Judge

## **Mingo County Coal Slurry Litigation-Ohio County**

James P. Mazzone, Lead Presiding Judge  
Jay M. Hoke, Presiding Judge  
John A. Hutchison, Presiding Judge  
Alan D. Moats, Resolution Judge  
Derek C. Swope, Lead Resolution Judge

## **Mountain State University Litigation-Kanawha County**

Alan D. Moats, Lead Presiding Judge  
Thomas C. Evans, III, Presiding Judge  
Derek C. Swope, Presiding Judge  
Booker T. Stephens, Lead Resolution Judge  
James P. Mazzone, Resolution Judge

## **Overweight Trucks Litigation-Lincoln County**

Jay M. Hoke, Presiding Judge

## **Tobacco Litigation-Ohio County**

Arthur M. Recht, Presiding Judge

## **Digitex® Litigation**

The final order dismissing the Digitex® Litigation and removing the cases from the Court's docket was entered on August 15, 2012.

## **Float-Sink Litigation**

The panel granted a number of the defendants' motions for discovery sanctions against plaintiffs and ordered plaintiffs to file amended expert witness disclosures, to make detailed amendments to their responses to the Plaintiff Fact Sheet to supply additional plaintiff-specific detail, and to amend their answers and responses to defendants' discovery requests to supply additional, plaintiff-specific detail.<sup>3</sup> The Court also ordered plaintiffs' counsel to pay monetary sanctions to several defendants for costs incurred while trying to enforce their rights to obtain plaintiffs' discovery responses.

Defendants objected to the sufficiency of plaintiffs' amended responses to the Plaintiff Fact Sheets and moved for dismissal. The Court found plaintiffs had failed to comply with the Court's prior discovery orders requiring more complete, plaintiff-specific responses to their Fact Sheets and, therefore, plaintiffs were precluded from presenting any evidence related to their past medical expenses and their expert witness disclosures regarding violation of specific safety standards, statutes, rules, or regulations. The Court also precluded any evidence of medical expenses because of plaintiffs' failure to provide this information in response to discovery requests.

The Court denied several motions for summary judgment based on the statute of limitations, subject to re-filing, and made findings of fact and conclusions of law regarding tolling of the statute of limitations for plaintiffs' deliberate intent claims. Based on the panel's findings, a number of defendants renewed their motions for summary judgment, and most of those motions were granted.

<sup>1</sup>Although not serving on the Mass Litigation Panel, First Judicial Circuit (Brooke, Hancock, and Ohio Counties) Judge Ronald E. Wilson presides in the Asbestos Personal Injury Litigation, conducting trial groups of approximately twenty cases in February, June, and October each year.

<sup>2</sup>Although not currently serving on the Mass Litigation Panel, Senior Status Judge Arthur M. Recht presides in both the FELA Asbestos Litigation and the Tobacco Litigation.

<sup>3</sup>The Float-Sink Litigation is related to *Katy Addair, et al. v. Litwar Processing Company, LLC*, et al., Civil Action No. 04-C-252 ("the Addair Litigation"), a group of cases pending in the Circuit Court of Wyoming County, West Virginia, since 2004. The same counsel represents the plaintiffs in the Addair Litigation and the Float-Sink Litigation, and the same claims are asserted against the manufacturer, distributor, and employer defendants - that the plaintiffs were harmed as the result of exposure to perchloroethylene (PERC) in the course of their employment in Float-Sink Laboratories in West Virginia. On February 9, 2012, the Supreme Court of Appeals of West Virginia affirmed the Circuit Court of Wyoming County's decision to grant summary judgment to various defendant employers and dismiss the deliberate intent claims of the plaintiffs in the Addair Litigation. The Supreme Court found that, "under the particular facts of the cases underlying this appeal, expert testimony is necessary to establish that the plaintiff petitioners have 'suffered serious compensable injury or compensable death . . . as a direct and proximate result of the specific unsafe working condition.' W. Va. Code § 23-4-2(2)(ii)(E). Because the plaintiff petitioners have been prohibited from presenting such evidence by virtue of sanctions imposed on them by the circuit court, they are unable, as a matter of law, to meet their burden of proof as to this element of their claim." *Katy Addair, et al. v. Litwar Processing Company, LLC*, et al., No. 11-0397 (West Virginia Supreme Court, February 9, 2012, p. 8). Thus, summary judgment was appropriate. The Wyoming County Circuit Court granted all Defendants' motions for summary judgment and dismissed Plaintiffs' claims for deliberate intent, medical monitoring, and products liability on April 12, 2012.

Lead Presiding Judge John A. Hutchison granted an agreed order dismissing plaintiffs' claims against certain manufacturing defendants, an agreed order voluntarily dismissing the employer defendants in thirteen cases, and four other agreed orders of voluntary dismissal for certain employer defendants. Plaintiffs also filed Notices of Anticipated Discontinuance advising the Court and defendants that seventy-two plaintiffs intended to discontinue their deliberate intent, medical monitoring, and product liability causes of action without prejudice. After hearings, the vast majority of these plaintiffs were dismissed with prejudice.

The Court also granted Defendant Litwar Processing's motion for summary judgment based on Plaintiff's failure to establish that Litwar violated any specifically applicable safety regulations or industry safety standards with respect to alleged float-sink chemical exposure, as required to prove a deliberate intent cause of action. The panel found that the Mine Act and Mine Safety and Health Administration regulations preempted Occupational Safety and Health Administration (OSHA) jurisdiction over coal operators; and under applicable federal law, the OSHA regulations the Plaintiff and Plaintiff's expert witness relied upon had no application to Litwar's operations.

Between December 12 and 14, 2012, the Resolution Judges conducted mediation in the forty-two remaining cases. Mediation resulted in settlements between Plaintiffs and the employer defendants against whom distributor defendant Preiser Scientific, Inc., had cross-claims for contribution and indemnity still pending. Although no settlement was reached between Plaintiffs and Preiser, the Resolution Judges agreed to allow the parties to conduct limited discovery before reconvening mediation.

### Flood Litigation

The Court recommended, approved, and ordered that unclaimed settlement funds held in the Interest on Lawyer Trust Accounts (IOLTA) of certain plaintiffs' counsel be subject to a *cy pres* award and determined the percentages of such *cy pres* award for each of the counties affected by the July 8, 2001, flooding event. Lead Presiding Judge John A. Hutchison subsequently contacted the chief judge in each affected county to obtain recommendations regarding appropriate *cy pres* award recipients.

### Mingo County Coal Slurry Litigation

The Mingo County Coal Slurry Litigation has been concluded. The Court is continuing to enter dismissal orders as individual releases are signed and is working through various post-settlement motions and proposed orders. Additionally, the Court entered an order implementing the medical monitoring protocol.

### Mountain State University Litigation

On December 6, 2012, the West Virginia Supreme Court of Appeals referred the Mountain State University Litigation to the Mass Litigation Panel. This litigation consists of 282 cases from four circuits alleging harm caused to plaintiffs as the result of Mountain State University's loss of general accreditation, special accreditations in its nursing and nurse anesthetist programs, and any other educational programs that require independent accreditation. With the advice

and consent of the panel, Judge Alan D. Moats was assigned to serve as Lead Presiding Judge, with Judge Derek C. Swope and Judge Thomas C. Evans, III, assisting as Presiding Judges. Judge Booker T. Stephens was assigned to serve as Lead Resolution Judge, with Judge Jay M. Hoke and Judge James P. Mazzone assisting as Resolution Judges. The litigation was transferred and consolidated in Kanawha County Circuit Court to facilitate the panel's case management and trial methodologies. The panel further ordered the litigation to be subject to electronic filing and service.

### Overweight Trucks Litigation

All cases composing this litigation have been settled and resolved.

### Electronic Filing and Service in Mass Litigation

From January 2012 through December 2012 in all mass litigation cases subject to electronic filing and service, 80,469 documents were e-filed and 2,520,527 documents were e-served. The statistics represent total volume of the Asbestos Personal Injury, Digitek®, Float-Sink, Flood, Mingo County Coal Slurry, and Tobacco Personal Injury Litigations. The statistics include items rejected in the clerk review process in order to capture all work performed in the various circuit court clerks' offices in these litigations, as well as orders, which do not go through the clerk review process.

During 2012, the number of pages electronically filed in all mass litigation cases subject to electronic filing and service totaled 512,050, which equals a little more than 213 boxes of paper documents, based on 2,400 pages per box. From December 2008, when electronic filing and service was first implemented in certain mass litigation cases, through the end of December 2012, pages filed electronically total 1,587,175, which translates to a little more than 661 boxes of paper documents.

From January 2012 through December 2012, a total of 12,204 orders were entered in mass litigation cases subject to electronic filing and service. That number includes bench orders entered by the judge but filed by a circuit clerk or attorney and orders denying motions as moot or withdrawn.

### Orders Subject to Electronic Filing and Service

	Jan-Dec 2012
Tobacco .....	17
Coal Slurry .....	491
Float-Sink .....	179
Flood .....	3
Digitek .....	16
Asbestos .....	11,498
<b>TOTAL .....</b>	<b>12,204</b>